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Kentucky Law Survey: Corporations

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Corporations

BY WILLBURT D. HAM*

The Corporations section of the present Survey overlaps with the one published during 1975.¹ Consequently, there are no new Kentucky corporation cases which have not already been the subject of comment. During the 1974-75 period, however, the United States Supreme Court handed down several decisions of interest affecting federal corporation law, and the flow of cases in other states continued unabated. It seems appropriate, therefore, to discuss three of the particularly relevant Supreme Court decisions, along with several cases from other jurisdictions which interpret and apply statutory provisions similar to those in the Kentucky Business Corporation Act.²

I. FEDERAL CORPORATION LAW

A. SEC Rule 10b-5.

The most noteworthy of the three Supreme Court cases was *Blue Chip Stamps v. Manor Drug Stores*,³ in which the Court approved the purchaser-seller standing requirement for damage suits brought under SEC Rule 10b-5.⁴ This SEC rule, prohibiting fraudulent or deceptive conduct in the purchase or sale of securities,⁵ was adopted by the Securities and Exchange

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¹ 63 Ky. L.J. 739 (1975).

² KY. REV. STAT. ch. 271A (Supp. 1974)[hereinafter cited as KRS].

³ 95 S. Ct. 1917 (1975).

⁴ 17 C.F.R. § 240.10b-5 (1975).

⁵ The full text of the rule reads as follows:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading,

or

(c) To engage in any act, practice, or course of business which

Commission in 1942 under the authority of § 10(b) of the Securities Exchange Act of 1934.⁶ Prior to 1942 there were statutory provisions in the Securities Acts sufficient to reach fraudulent conduct perpetrated by sellers on the buyers of securities,⁷ but there were no provisions sufficient without Commission implementation to protect ordinary sellers of securities from fraudulent conduct by buyers.⁸ Rule 10b-5 was adopted by the Commission to fill this gap.⁹ Since that time Rule 10b-5 has enjoyed such an expansive application that it has rapidly become the dominant force for policing misconduct in corporate securities transactions.¹⁰ It has even invaded the corporate mismanagement field, normally considered an area reserved for the application of state fiduciary law principles.¹¹

operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Id.

⁶ 15 U.S.C. § 78j(b) (1970). The full text of the section reads:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

...

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

⁷ See Securities Act of 1933 § 17(a), 15 U.S.C. § 77q (1970).

⁸ Although the Securities Exchange Act of 1934 § 15(c), 15 U.S.C. 78o(c)(1970) covers fraudulent practices involved in both the purchase and sale of securities, it relates only to such conduct by brokers and dealers.

⁹ For the gap-filling origins of the Rule, see *Proceedings, Conference on Codification of Federal Securities Laws*, 22 BUS. LAW. 793, 922 (1967) (remarks by Milton Freeman).

¹⁰ Professor Alan Bromberg has remarked: "[The Rule] is by now such a dominant factor in private securities litigation that one is surprised when it does not turn up, and a court does not hesitate to introduce it as a major consideration if plaintiff fails to plead it." A. BROMBERG, *SECURITIES LAW: FRAUD, SEC RULE 10b-5* § 2.5(6) (1973).

¹¹ See *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6 (1971), which involved the embezzlement of 5 million dollars from Manhattan Casualty Co. by two individuals who had acquired the ownership of the company from its former owner, Bankers Life & Casualty Co. The funds embezzled, which were used to pay loans the two had obtained to enable them to purchase the stock of Manhattan from Bankers Life, had arisen from the sale of a quantity of U.S. Treasury Bonds held by Manhattan as an investment. There was no fraud involved in the market sale of the bonds, and, therefore, no fraud in that sense in connection with the purchase and sale of a security.

One restraining influence which has kept Rule 10b-5 from making even further inroads into state fiduciary duty law has been the application by the courts of the purchaser-seller standing requirement first enunciated in 1952 by the Second Circuit Court of Appeals in *Birnbaum v. Newport Steel Corp.*¹² In that case the court refused to permit a mere shareholder in a corporation to maintain a Rule 10b-5 suit for damages, either as a class action or derivatively, for alleged misconduct on the part of the controlling shareholder in selling his interest to outside parties at a premium.¹³ The court concluded that Rule 10b-5 was intended to apply only to plaintiffs who were defrauded purchasers or sellers of stock. The standing requirement thus enunciated in *Birnbaum* has been generally adhered to in other circuits,¹⁴ including the Sixth Circuit.¹⁵ Although it has suffered some attrition, mainly through an expansive interpretation of "purchasers" or "sellers" of stock within the meaning of the rule,¹⁶ at the time of the *Blue Chip Stamps* decision, only the Seventh Circuit had rejected it outright.¹⁷

However, Mr. Justice Douglas, speaking for the Court, said that it was sufficient if the fraud touched the sale of securities. *Id.* at 12-13.

¹² 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952).

¹³ The controlling stockholder, Feldmann, who was also president and a director of the corporation involved, Newport Steel Corporation, had sold his controlling interest to a syndicate of endusers of steel products in a period of short supply. Shortly before the sale of his interest to the syndicate, Feldmann rejected an offer from Follansbee Steel Corporation for a merger of Follansbee with Newport which, on the terms proposed, would have benefited all the stockholders of Newport. There were allegations that Feldmann and other named defendants had made certain misrepresentations in letters sent to the stockholders of Newport, both at the time of the negotiations with Follansbee, and later, after Feldmann's sale of his stock to the syndicate. *Id.* at 462.

¹⁴ See A. JACOBS, *THE IMPACT OF RULE 10b-5* § 38.01(d) n.10 (1974).

¹⁵ *Simmons v. Wolfson*, 428 F.2d 455 (6th Cir. 1970), *cert. denied*, 400 U.S. 999 (1971).

¹⁶ See, e.g., *SEC v. National Sec., Inc.*, 393 U.S. 453 (1969) (transfer of stock in a merger); *Vine v. Beneficial Fin. Co.*, 374 F.2d 627 (2d Cir.), *cert. denied*, 389 U.S. 970 (1967) (forced sale as result of short form merger). See also *James v. Gerber Prods. Co.*, 483 F.2d 944 (6th Cir. 1973) (beneficiary of testamentary trust treated as having standing to sue for trustee's alleged wrongful sale of shares held by the trust).

¹⁷ See *Eason v. General Motors Acceptance Corp.*, 490 F.2d 654 (7th Cir. 1973), *cert. denied*, 416 U.S. 960 (1974). The present discussion of the *Birnbaum* standing requirement relates only to private civil suits for money damages. It has been held inapplicable to suits for injunctive relief. See *Mutual Shares Co. v. Genesco, Inc.*, 384 F.2d 540 (2d Cir. 1967). This position on injunctive relief can be traced to a Supreme Court decision involving the Investment Advisors Act of 1940, in which the Court had said: "It is not necessary in a suit for equitable or prophylactic relief to establish all

In *Blue Chip Stamps* the Ninth Circuit Court of Appeals applied one of the recognized exceptions to the *Birnbaum* standing requirement, the "aborted" purchaser doctrine.¹⁸ The case involved, however, a rather significant extension of that doctrine. The exception originated in cases involving actual contracts to purchase stock in which the seller had later negotiated a sale to others resulting in a breach of contract with the original buyer.¹⁹ In the *Blue Chip Stamps* case, there were prospective purchasers of stock who had been persuaded not to buy, but there were no contracts to purchase which had been breached. The suit was brought as a class action for damages by Manor Drug Stores, a nonshareholder customer of Blue Chip Stamp Company, charging the company with intentionally preparing and distributing an overly pessimistic prospectus designed to discourage the nonshareholder customers from purchasing stock at bargain prices under an antitrust consent decree. It was alleged that this was done so that the rejected shares could then be sold to the public at a higher price. The district court dismissed the complaint.²⁰ The Ninth Circuit reversed the district court and upheld the complaint, analogizing the consent decree to a contract of purchase.²¹ The Supreme Court granted Blue Chip's petition for certiorari,²² and reversed the court of appeals in a 6-3 decision.²³

The majority of the Court, speaking through Mr. Justice Rehnquist, approved the *Birnbaum* standing requirement as a proper interpretation of Rule 10b-5, based on the Rule's legislative history and on the policy of curtailing the dangers of vexatious litigation, to which the majority felt Rule 10b-5 was pecu-

the elements required in a suit for monetary damages." *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 193 (1963).

¹⁸ See *Commerce Reporting Co. v. Puretec, Inc.*, 290 F. Supp. 715 (S.D.N.Y. 1968).

¹⁹ *Id.*

²⁰ *Manor Drug Stores v. Blue Chip Stamps*, 339 F. Supp. 35 (C.D. Cal. 1971).

²¹ *Manor Drug Stores v. Blue Chip Stamps*, 492 F.2d 136 (9th Cir. 1974). Judge Hufstедler contended in a vigorous dissenting opinion that the nonpurchasing plaintiffs in *Blue Chip Stamps* were no different from other nonshareholder, nonpurchasing members of the public who were later offered securities under the same consent decree. *Id.* at 146.

²² 419 U.S. 992 (1974).

²³ 95 S. Ct. at 1935.

liarily susceptible.²⁴ The Court rejected as unsound the analogy drawn by the court of appeals between a consent decree and a contract to purchase, pointing out that by definition in the Securities Exchange Act the terms "buy" and "purchase" include "any contract to buy."²⁵ In a concurring opinion, Mr. Justice Powell, joined by Justices Stewart and Marshall, emphasized that the textual makeup of the various antifraud provisions of the securities acts, including the language of 10(b) and Rule 10b-5, support the *Birnbaum* rule.²⁶ Mr. Justice Blackmun wrote a vigorous dissent, in which Justices Douglas and Brennan concurred, strongly criticizing the majority opinion for ignoring the broad, general intent of Congress, as manifested by the Securities Acts, to protect the investing public from fraudulent practices affecting their stock interests.²⁷ Nevertheless, this decision will probably slow somewhat the further extension of federal corporation law through Rule 10b-5 into the corporate mismanagement area.²⁸

B. *The Williams Act*

The second of the Supreme Court decisions, *Rondeau v. Mosinee Paper Corp.*,²⁹ involved a significant interpretation of the filing requirements of § 13(d) of the Securities Exchange Act of 1934.³⁰ Section 13(d), which was added to the Exchange Act as a part of the Williams Act amendments in 1968,³¹ per-

²⁴ *Id.* at 1925-32. The Court also emphasized the longstanding judicial acceptance of the *Birnbaum* rule and the failure of Congress to reject the rule. *Id.* at 1924.

²⁵ *Id.* at 1932-35. Section 3(a)(13) of the Act provides: "The terms 'buy' and 'purchase' each include any contract to buy, purchase, or otherwise acquire." 15 U.S.C. § 78c(a)(13)(1970). The Court noted that a consent decree is not enforceable by those not parties to it, though they may be benefited by it. 95 S. Ct. at 1932.

²⁶ 95 S. Ct. at 1935-37.

²⁷ *Id.* at 1937-42.

²⁸ For a discussion of Rule 10b-5 as applied to corporate mismanagement cases, see Cox, *Fraud is in the Eyes of the Beholder: Rule 10b-5's Application to Acts of Corporate Mismanagement*, 47 N.Y.U.L. Rev. 674 (1972).

²⁹ 95 S. Ct. 2069 (1975).

³⁰ 15 U.S.C. § 78m(d) (1970).

³¹ Act of July 29, 1968, Pub. L. No. 90-439, 82 Stat. 454. One of the stated purposes of the Williams Act was to require the disclosure of pertinent information and afford other protections to stockholders "when a person or group of persons seeks to acquire a substantial block of equity securities of a corporation by a cash tender offer or through open market or privately negotiated purchases." S. REP. No. 550, 90th Cong., 1st Sess. 1 (1968). For an overview of the Williams Act and the additions it made to

tains to acquisition of substantial blocks of stock in public companies. As implemented by SEC Rule 13d-1,³² it requires any person acquiring more than five percent of a class of stock of a public company³³ to file a Schedule 13D with the SEC, the target company and each stock exchange where the security is traded. The schedule must contain certain specified information concerning the acquisition, including a statement as to the purpose of the acquisition.³⁴

Rondeau, a Mosinee, Wisconsin, businessman, began making substantial purchases of the common stock of Mosinee Paper Corporation during April, 1971. By May 17, 1971, he had acquired more than 5 percent of the Mosinee common stock. Although he was then obligated to file a Schedule 13D, he failed to do so, contending that he was unaware that such a filing was required of him at that particular time.³⁵ Rondeau

the Securities Exchange Act of 1934, see Brown, *The Scope of the Williams Act and Its 1970 Amendments*, 26 Bus. Law. 1637 (1971).

³² 17 C.F.R. § 240.13d-1, -101 (1975).

³³ Public company refers to those companies required to register their securities pursuant to § 12 of the Securities Exchange Act of 1934. Such companies include those whose securities are listed for trading on a national securities exchange, and, since the Securities Acts Amendments of 1964, those whose securities are traded over-the-counter, if they have assets in excess of \$1,000,000 and a class of stock (equity securities) held of record by 500 or more persons. See 15 U.S.C. § 761 (1970).

³⁴ The relevant portion of § 13(d)(1) reads:

Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security . . . is directly or indirectly the beneficial owner of more than 5 per centum of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors

15 U.S.C. § 78m(d)(1) (1970).

Among the items of information referred to in § 13(d)(1) is one designated "(C)", which provides that if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, the buyer is to state any plans or proposals which he or those associated with him may have "to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure." 15 U.S.C. § 78(d)(1)(c) (1970). However, the Commission in Rule 13d-1 requires the purpose of the purchases or proposed purchases to be disclosed, regardless of whether that purpose relates to changes in control. See 17 C.F.R. § 240.13d-1 to -101 (1975).

³⁵ 95 S. Ct. at 2074. The district court accepted Rondeau's testimony that he believed when he made his purchases that the filing of a Schedule 13D was not required

continued to purchase Mosinee stock until July 30, 1971, when he was notified by the company that his purchases seemed "to have created some problems under the Federal Securities Laws."³⁶ Rondeau stopped making any further purchases, consulted an attorney, and on August 26, 1971, filed a Schedule 13D. Mosinee Paper Corporation then instituted a suit in federal district court seeking, *inter alia*, to enjoin Rondeau from voting or pledging his Mosinee Stock.³⁷

The district court granted a summary judgment against Mosinee, concluding that Rondeau had committed only a technical violation of the Williams Act and that the violation had not resulted in damage to the corporation.³⁸ The Court of Appeals for the Seventh Circuit reversed and remanded the case to the district court with instructions to enjoin Rondeau from further violations of the Williams Act and from voting, for a period of 5 years, any shares of Mosinee stock purchased between the due date of Schedule 13D and the date of its actual filing.³⁹ The court of appeals concluded that failure to file a timely Schedule 13D had injured Mosinee by delaying its preparation of any response it might have wished to make to Rondeau's potential to obtain control of the company.⁴⁰ The court also ruled that the traditional requirement of a showing of irreparable harm as a prerequisite for obtaining permanent injunctive relief was inapplicable to target companies under the Williams Act, since such companies were in the best position "to assure that the filing requirements of the Williams Act are being timely and fully complied with and to obtain speedy and forceful remedial action when necessary."⁴¹

The Supreme Court rejected the Seventh Circuit's conclusion that a showing of irreparable harm was unnecessary to enable a private litigant to obtain injunctive relief in a suit

until his holdings exceeded 10 percent of the corporation's stock. *Id.* n.4. The 10 percent requirement appeared in the Williams Act as originally enacted but had been reduced to 5 percent as a result of amendments to the Act adopted by Congress in 1970. Act of Dec. 22, 1970, Pub. L. No. 91-567 § 1, 84 Stat. 1497.

³⁶ 95 S. Ct. at 2073.

³⁷ *Id.* at 2074.

³⁸ *Mosinee Paper Corp. v. Rondeau*, 354 F. Supp. 686 (W.D. Wis. 1973).

³⁹ *Mosinee Paper Corp. v. Rondeau*, 500 F.2d 1011 (7th Cir. 1974).

⁴⁰ *Id.* at 1016-17.

⁴¹ *Id.* at 1017. One judge dissented, taking the position that no violation of the Williams Act had occurred. *Id.*

under § 13(d) of the Williams Act and ordered reinstatement of the district court's judgment.⁴² The Court took the position that the disclosure requirements of the Williams Act were intended only to insure that the incumbent management of a target company would have an opportunity "to express and explain its position."⁴³ It held that Rondeau's failure to timely file the Schedule 13D had not disadvantaged the company in meeting this need, since Rondeau had not as yet attempted to obtain control of Mosinee Paper Corporation.⁴⁴ The Court noted that Rondeau had filed a proper, although late, Schedule 13D and that there was no suggestion that he would fail to keep current the information contained in the Schedule, as required by the Act.⁴⁵ Therefore, the Court reasoned, the usual requirement for injunctive relief, that there be "some cognizable danger of recurrent violation,"⁴⁶ was not met.

The Supreme Court's decision that a mere technical violation of the disclosure requirements of the Williams Act, without more, is not enough to authorize injunctive relief,⁴⁷ should offer considerable comfort to those caught in an inadvertent failure to meet Schedule 13D filing deadlines. Such oversight is a real possibility since the filing requirements under Section 13(d) of the Securities Exchange Act have been less well known in the corporate world, at least until recently, than similar filing requirements for the making of tender offers under Sec-

⁴² 95 S. Ct. at 2079.

⁴³ *Id.* at 2076.

⁴⁴ *Id.* The district court had accepted Rondeau's assertion that he had not considered obtaining control of Mosinee Paper Corp. until some time after the date he became aware of his obligation to file a Schedule 13D. 354 F. Supp. at 690. In his Schedule 13D, Rondeau stated that he and his associates "presently propose to seek to acquire additional common stock of the Issuer in order to obtain effective control of the Issuer, but such investments as originally determined were and are not necessarily made with this objective in mind." 95 S. Ct. at 2073.

⁴⁵ 95 S. Ct. at 2076.

⁴⁶ *Id.* at 2076. The quotation by the Court was from its opinion in *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953).

⁴⁷ The decision was 6-3. Mr. Justice Marshall dissented without opinion. Mr. Justice Brennan wrote a short dissenting opinion, in which Mr. Justice Douglas joined, urging that the violation of the Williams Act itself be treated as establishing the actionable harm justifying injunctive relief, since this would better carry out the perceived congressional objective of providing investors and management with notice of the potential for shifts in control at the earliest possible moment. *Id.* at 2079.

tion 14(d) of that Act,⁴⁸ which were also added by the Williams Act amendments.⁴⁹

C. *Corporate Mismanagement Suits*

The third Supreme Court case, *Bangor Punta Operations, Inc. v. Bangor & Aroostock Railroad Co.*,⁵⁰ contains significant implications for controlling interests in a corporation who attempt to sue former owners in the corporate name for alleged misconduct while in control of the corporation. In this case, Amoskeag Co., as purchaser of substantially all the outstanding stock of Bangor & Aroostock Railroad Co. [hereinafter referred to as BAR],⁵¹ brought suit in the name of BAR against Bangor Punta alleging various acts of corporate waste and mismanagement under both federal and state law.⁵² The district court granted Bangor Punta's motion for summary judgment and dismissed the action.⁵³ It determined that Amoskeag would

⁴⁸ 15 U.S.C. § 78n(d) (1970).

⁴⁹ In a 1971 decision, the Second Circuit Court of Appeals referred to § 13(d) as "a largely unnoticed provision added in 1968 by the Williams Act." *GAF Corp. v. Milstein*, 453 F.2d 709, 712 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972). For a general overview of § 13(d) and its implications for holders, sellers and purchasers of securities, see Robinson & Mahoney, *Schedule 13D: Wild Card in The Takeover Deck*, 27 BUS. LAW. 1107 (1972).

⁵⁰ 417 U.S. 703 (1974). Other recent Supreme Court decisions of significance affecting corporation law include: *Cort v. Ash*, 95 S. Ct. 2080 (1975) (private damage suits not authorized under the federal law placing a ban on corporate political contributions); *United Housing Foundation, Inc. v. Forman*, 95 S. Ct. 2051 (1975) (shares of stock entitling a purchaser to lease an apartment in a state subsidized and supervised nonprofit housing cooperative not "securities" within the meaning of the securities acts); *United States v. Park*, 95 S. Ct. 1903 (1975) (corporate president criminally liable for his corporation's violation of the sanitary provisions of the federal food and drug laws).

⁵¹ Amoskeag had acquired 98.3 percent of BAR stock through its purchase from Bangor Punta and later acquired additional shares which increased its ownership to more than 99 percent of BAR's outstanding stock.

⁵² The factual statement in the text is a simplified version of the transactions. Amoskeag had purchased a 98.3 percent interest in BAR from Bangor Punta Operations, Inc., a wholly owned subsidiary of Bangor Punta Corp. Several years previously, Bangor Punta Operations, Inc. had acquired its 98.3 percent interest in BAR by purchasing all the assets of Bangor & Aroostock Corp., a holding company of BAR. The suit was brought by BAR and its wholly owned subsidiary, Bangor Investment Co., against Bangor Punta Corp. and its wholly owned subsidiary, Bangor Punta Operations, Inc.

⁵³ *Bangor & Aroostock R.R. v. Bangor Punta Operations, Inc.*, 353 F. Supp. 724 (N.D. Me. 1972).

have been barred from maintaining a stockholder's derivative suit under the "contemporaneous ownership" requirement imposed by both the Federal Rules of Civil Procedure⁵⁴ and state law⁵⁵ and held that equitable principles precluded allowing Amoskeag "to accomplish indirectly what it could not do directly."⁵⁶ The trial court found that Amoskeag, as the real beneficiary of any recovery, had not been damaged by Bangor Punta's alleged wrongful conduct, and therefore should not be allowed to benefit from a corporate recovery.⁵⁷ The First Circuit Court of Appeals reversed, stressing that the quasi-public nature of BAR and the existence of a strong public interest in promoting the financial health of the nation's railroads were sufficient to offset any personal benefit which Amoskeag might enjoy from a corporate recovery.⁵⁸ The Supreme Court, in a 5-4 decision, reversed the court of appeals, holding that since Amoskeag would have been precluded from bringing a stockholder's derivative suit under the "tainted shares" doctrine,⁵⁹ it should not be permitted to circumvent the equitable policy

⁵⁴ See FED. R. CIV. P. 23.1, which provides that in a derivative action the complaint shall allege, among other things: "[T]hat the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law"

⁵⁵ See ME. REV. STAT. ANN. tit. 13-A, § 627(1)(A) (1974). Although this Act did not become effective until after the present suit was brought, the federal district court assumed prior Maine law would have applied the "contemporaneous ownership" rule, since there were no Maine cases to the contrary. 353 F. Supp. at 727. The majority of the states today have adopted the "contemporaneous ownership" rule either by decision or statute. See 3B J. MOORE, FEDERAL PRACTICE ¶ 23.1.15(2) n.6 (2d ed. 1975). The present Kentucky Business Corporation Act adopts the "contemporaneous ownership" requirement. See KRS § 271A.245, which states in part:

No derivative action shall be brought in this state in the right of a domestic or foreign corporation by a person claiming ownership of shares of the corporation or voting trust certificates therefor unless the plaintiff was an owner of shares or of voting trust certificates therefor at the time of the transaction of which he complains, or his shares or voting trust certificates thereafter devolved upon him by operation of law from a person who owned them at such time

⁵⁶ 353 F. Supp. at 728.

⁵⁷ *Id.*

⁵⁸ *Bangor & Aroostock R.R. v. Bangor Punta Operations, Inc.*, 482 F.2d 865 (1st Cir. 1973).

⁵⁹ The "tainted shares" doctrine is predicated on the proposition that subsequent purchasers of stock stand in the shoes of their transferor. See 13 W. FLETCHER, PRIVATE CORPORATIONS § 5980 (perm. ed. rev. repl. 1970).

reflected in that doctrine by bringing suit in the name of BAR.⁶⁰ The Court, speaking through Mr. Justice Powell, also expressed concern that Amoskeag would receive a windfall if it were allowed to maintain the corporate suit.⁶¹

Although *Bangor Punta* turned on equitable considerations, the Court's restrictive attitude concerning suits in the corporate name where policy considerations preclude a derivative suit suggests that the "contemporaneous ownership" rule might be enough in itself to bar suits in the corporate name by purchasers of controlling interests.⁶² Indeed, such a position has already been taken by the New York Court of Appeals as to New York's "contemporaneous ownership" requirement.⁶³ While it may well be that *Bangor Punta* should not be read this broadly,⁶⁴ if the New York view gains further acceptance, it

⁶⁰ The Court relied heavily on the opinion written by Dean (then Commissioner) Pound for the Supreme Court of Nebraska in *Home Fire Ins. Co. v. Barber*, 93 N.W. 1024 (Neb. 1903), in which he held that equitable considerations precluded a suit in the corporate name by shareholders who had purchased their shares from the alleged wrongdoers, and who would in effect be recovering a large portion of the purchase price if a corporate recovery were permitted. 417 U.S. at 711.

In *Bangor Punta*, Mr. Justice Marshall wrote a vigorous dissenting opinion in which he questioned whether Amoskeag would recover a windfall if the corporate suit were allowed. He noted that there was no indication in the record that Amoskeag was aware of Bangor Punta's alleged wrongful conduct when it set the purchase price of the BAR stock. Furthermore, he thought a windfall was unlikely in view of the power of a court of equity to impose restrictions on the use BAR could make of any money recovered. *Id.* at 723-25. Justice Marshall argued that even if Amoskeag recovered a windfall, there were still the railroad's creditors to be considered, as well as the public's interest in the financial health of the country's railroads. *Id.* at 725-28. He distinguished *Barber* on the ground that in *Barber* the purchaser had acquired *all* the company's stock, whereas in *Bangor Punta* there were still a number of minority stockholders eligible to bring a derivative suit, even though Amoskeag held over 99% of the BAR stock. *Id.* at 720-22.

⁶¹ The Court pointed out that Amoskeag had paid \$5,000,000 for the BAR stock, and that if BAR were allowed to recover the \$7,000,000 claimed as damages resulting from the wrongful acts of the former owner, Bangor Punta, it would result in Amoskeag recouping the entire purchase price it had paid for the stock plus an additional \$2,000,000. 417 U.S. at 716.

⁶² Arguably, the "contemporaneous ownership" requirement as embodied in both Rule 23.1 and state laws is grounded on policy considerations peculiar to the derivative suit and is, therefore, not relevant to suits brought in the corporate name. See 3B J. MOORE, *FEDERAL PRACTICE* ¶ 23.1.15 (2d ed. 1975). Those policy considerations relate to the collusive transfer of shares to confer federal jurisdiction and to the bringing of "strike" suits. *Id.*

⁶³ *Capitol Wine & Spirit Corp. v. Pokrass*, 98 N.Y.S.2d 291 (App. Div.) *aff'd*, 98 N.E.2d 704 (N.Y. 1951).

⁶⁴ One commentator has suggested that: "The Court's refusal to apply formal

could reduce even further the opportunities for controlling interests to bring private lawsuits seeking recovery for corporate wrongdoing on the part of former owners. Whatever the implications of the *Bangor Punta* decision may be, "the Supreme Court rejected an opportunity to expand this use of private actions" by refusing to permit the corporation to maintain the suit.⁶⁵

II. STATE CORPORATION LAW

A. *Involuntary Dissolution*

Turning to recent developments in corporation law at the state level, court-ordered dissolution at the request of minority stockholders continues to produce a steady flow of litigation, particularly in the context of the close corporation. Courts of equity traditionally have been reluctant to entertain suits by stockholders to dissolve a corporation in the absence of statutory authorization.⁶⁶ As a result of this judicial reluctance, corporation statutes today typically grant a majority of the stockholders the power to voluntarily dissolve the corporation.⁶⁷ Such statutory provisions do not, of course, aid the minority stockholder who wants to sever an unsatisfactory relationship with the majority by securing a dissolution of the corporation. More recently, however, courts have been less hesitant to grant relief to minority interests if the grounds for dissolution are sufficiently serious, such as where there are charges of fraudulent or oppressive conduct by the controlling interests.⁶⁸ In ad-

contemporaneous-shareholder requirements demonstrated tacit recognition of the limited role of derivative-suit requirements." Comment, 1 J. CORP. L. 186, 193 (1975).

⁶⁵ *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 13, 227 (1974).

⁶⁶ See *Israel's, The Sacred Cow of Corporate Existence: Problems of Deadlock and Dissolution*, 19 U. CHI. L. REV. 778 (1952).

⁶⁷ See, e.g., KRS § 271A.410 (voluntary dissolution by incorporators); KRS § 271A.415 (voluntary dissolution by consent of shareholders); KRS § 271A.420 (voluntary dissolution by act of the corporation).

⁶⁸ See *Liebert v. Clapp*, 196 N.E.2d 540, 247 N.Y.S.2d 102 (1963), in which the New York Court of Appeals recognized its power as a court of equity to dissolve a corporation at the request of minority stockholders where the dominant stockholders or directors were charged with "looting" the corporate assets or managing the corporation for their own special benefit. The court said: "Although there is no explicit statutory authority for the relief of dissolution sought in this action, the entire court is agreed that it is available as a matter of judicial sponsorship." 196 N.E.2d at 542, 247 N.Y.S.2d at 104. Later, however, in *Kruger v. Gerth*, 210 N.E.2d 355, 263 N.Y.S.2d 1

dition, there are now special statutory provisions in a number of states recognizing such conduct as sufficient grounds for court-ordered dissolution at the request of minority stockholders.⁶⁹

A recent decision by the Supreme Court of Virginia, *Baylor v. Beverly Book Co.*,⁷⁰ illustrates the impact which these new statutory provisions can have in protecting the interests of minority stockholders. The Virginia corporation statute confers jurisdiction on the courts in a stockholder action when it is established: "That the acts of the directors or those in control of the corporation are illegal, oppressive or fraudulent,"⁷¹ or "That the corporate assets are being misapplied or wasted."⁷² The plaintiff, Baylor, complained of the conduct of his co-shareholder, Dixon, which he considered to be domineering and oppressive,⁷³ and asked that the corporation be liquidated.⁷⁴ The corporation and Dixon defended by asserting that under the bylaws of the corporation any individual stockholder wishing to sell his stock was required to give the corporation or the remaining stockholders a "first option" to purchase at par value,⁷⁵ and that, since they were willing to pay Baylor this amount for his stock, the dissolution statute did not apply.⁷⁶ The trial court upheld this contention and ordered the suit dismissed.⁷⁷ The Supreme Court of Virginia reversed, holding

(1965), the court refused to extend the *Liebert* doctrine to a case in which the minority stockholder based his request for dissolution on economic hardship resulting from the inability of the corporation to earn an adequate return on his investment.

⁶⁹ See, e.g., ABA-ALI MODEL BUS. CORP. ACT § 97 (rev. ed. 1974) [hereinafter cited as MODEL ACT].

⁷⁰ 216 S.E.2d 18 (Va. 1975).

⁷¹ VA. CODE ANN. § 13.1-94(a)(2) (Interim Supp. 1975).

⁷² *Id.* at § 13.1-94(a)(4).

⁷³ There were charges that Dixon had ignored the separate corporate existence by failing to hold meetings of the directors and stockholders, that he had operated the corporation to suit his own ends without following proper corporate procedure, and that he had made interest-free loans of corporate funds to himself without appropriate corporate action at a time when the corporation was borrowing money from commercial lending institutions. 216 S.E.2d at 18.

⁷⁴ Actually, Dixon requested alternatively that either the corporation be liquidated or that the court award other appropriate relief. *Id.*

⁷⁵ The bylaws provided: "'Any individual stockholder desiring to sell his stock, either in whole or part, must first give, in writing, the corporation, or remaining stockholders, the opportunity to purchase such stock at par value.'" *Id.* at 18-19.

⁷⁶ *Id.* at 19.

⁷⁷ *Id.*

that the bylaw provision was inapplicable because Baylor was seeking not to sell his stock, but to obtain the relief which the statute had provided for stockholders who complained of oppressive conduct or waste of corporate assets.⁷⁸ The court stated: "This statute is remedial in nature and should be liberally construed It provides an additional remedy for the protection of the rights of stockholders, particularly minority stockholders."⁷⁹

This Virginia case, based as it was on the provisions of the Virginia corporation statute pertaining to involuntary dissolution, provides an interesting contrast to the position in which Kentucky courts would find themselves if confronted with a similar request for dissolution by a minority stockholder in a Kentucky corporation. In adopting the provisions of the Model Business Corporation Act on involuntary dissolution,⁸⁰ which are comparable to those contained in the Virginia statute,⁸¹ Kentucky deleted the word "oppressive" from the paragraph authorizing dissolution for "illegal, oppressive or fraudulent" conduct,⁸² and deleted completely the paragraph authorizing dissolution when corporate assets are being misapplied or wasted.⁸³ This was done chiefly, it appears, because of concern that the omitted provisions might enable minority interests to interfere with the majority's legitimate efforts to conduct the business of the corporation.⁸⁴ Furthermore, the word "oppressive" as a basis for stockholder complaint was apparently thought to be too loose a term to tame judicially, as compared with such traditional concepts as "illegal" or "fraudulent."⁸⁵ It

⁷⁸ *Id.* at 19-20.

⁷⁹ *Id.* at 19.

⁸⁰ MODEL ACT § 97.

⁸¹ The Model Act was used as a basis for the drafting of a new Virginia Stock Corporation Act in 1956. See Gibson, *The Virginia Corporation Law of 1956*, 42 VA. L. REV. 445, 448 (1956).

⁸² KRS § 271A.475(1)(a)2.

⁸³ MODEL ACT § 97(a)(4).

⁸⁴ This was the impression the author carried away with him as a result of his membership on the special legislative advisory committee which reviewed the proposed new corporation statute before its final adoption by the Kentucky General Assembly during the 1972 session. For the legislative background to the adoption of the present Kentucky Business Corporation Act, see Ham, *Kentucky Adopts a New Business Corporation Act*, 61 Ky. L.J. 73 (1972).

⁸⁵ For a discussion of oppression as a statutory ground for corporate dissolution, see Comment, *Oppression as a Statutory Ground for Corporate Dissolution*, 1965 DUKE L.J. 128.

is not altogether clear, therefore, that the type of conduct alleged in the *Baylor* case would provide a basis for a decree of involuntary dissolution under the Kentucky Business Corporation Act.⁸⁶ To the extent that it does not, it underscores the more limited and conservative approach to involuntary dissolution which may result under the Kentucky statute.⁸⁷

B. *Appraisal Remedy*

A recent Arizona case, *Waite v. Old Tucson Development Co.*,⁸⁸ serves to illustrate the strict interpretation which courts give to the procedural steps required under modern corporation statutes for dissenting stockholders to perfect their appraisal rights.⁸⁹ The Waites, a husband and wife who owned 1,626 shares of common stock in Old Tucson Development Company, an Arizona corporation, objected to a proposed merger of their corporation with Old Tucson Corporation, a Delaware corporation. Under the Arizona corporation statute, a stockholder who votes to reject a merger is entitled to be paid the fair cash value of his stock if he gives the corporation written notice of his dissent within 2 days after the consolidation meeting.⁹⁰ The Waites gave written notice of their objec-

⁸⁶ While conduct which involves failure to follow internal corporate procedures or which involves action taken to serve the selfish interests of a particular faction in the corporation may constitute a breach of "fiduciary duty," and therefore be subject to classification as "oppressive," it might be stretching the nature of such conduct somewhat to call it either "illegal" or "fraudulent," particularly when it is not altogether clear such conduct could even be classified as "oppressive." For a case recognizing conduct of this general nature as sufficiently objectionable to be "oppressive" within the meaning of that term as used in the Illinois Business Corporation Act, see *Gidwitz v. Lanzit Corrugated Box Co.*, 170 N.E.2d 131 (Ill. 1960). In discussing the meaning of the word "oppressive" the Supreme Court of Illinois commented: "The word does not necessarily savor of fraud . . . It is not synonymous with 'illegal' and 'fraudulent.'" 170 N.E.2d at 135. See also *White v. Perkins*, 189 S.E.2d 315 (Va. 1972), in which the Supreme Court of Virginia made a similar observation that "oppressive" was not synonymous with "illegal" and "fraudulent." 189 S.E.2d at 319.

⁸⁷ The two remaining paragraphs of the Kentucky statute on court-ordered dissolution at the request of a shareholder pertain to dissolution based on director or shareholder deadlock. See KRS §§ 271A.475(1)(a)1-3.

⁸⁸ 528 P.2d 1276 (Ariz. Ct. App. 1975).

⁸⁹ The appraisal right is the right given to dissenting stockholders to be paid the fair cash value of their stock in certain cases of fundamental corporate change. See H. HENN, *CORPORATIONS* § 349 (2d ed. 1970). For applicable Kentucky statutory provisions, see KRS §§ 271A.400-.405.

⁹⁰ ARIZ. REV. STAT. ANN. § 10-347 (1956). The Kentucky statute requires the share-

tions on the date the stockholders met to vote on the merger, but they failed to vote to reject the merger proposal. The trial court granted a motion by the defendant corporations to dismiss the complaint⁹¹ which was affirmed on appeal.⁹² The court treated the Waites' failure to vote to reject the merger as fatal to their statutory claim to be paid the fair value of their stock.⁹³

The *Waite* case, in addition to emphasizing the care which dissenting stockholders seeking the appraisal remedy should exercise to ensure that they have complied with all prescribed statutory formalities, also suggests that such stockholders need to be provided with adequate notice as to the nature of these formalities. Although the stockholders in *Waite* were given notice,⁹⁴ this has not been generally required under the appraisal statutes.⁹⁵ The Kentucky Court of Appeals has held that corporate officers are not under any duty to volunteer such information.⁹⁶ There is thus the real possibility that an objecting stockholder will not learn about his appraisal rights soon enough to

holder to file a written objection to the proposed action prior to or at the meeting called to vote on the proposed matter. While it provides that he must not vote in favor of the proposed action, it does not require that he vote to reject the proposed action, as in the Arizona statute. See KRS § 271A.405(1). The requirement that the dissenting shareholder vote against the proposed action is being dropped in the new Arizona General Corporation Law, which is to become effective July 1, 1976. See ARIZ. REV. STAT. ANN. § 10-081 (Supp. 1975).

⁹¹ 528 P.2d at 1277.

⁹² *Id.* at 1279.

⁹³ *Id.* at 1278. The strict interpretation given to the statutory requirements for appraisal is not unusual. As an illustration of how far a court may go, the Supreme Court of Ohio denied an appraisal right to a shareholder because he made his demand (which was required to be in writing) through an agent, and the written authority of the agent did not accompany the demand. *Klein v. United Theaters Co.*, 74 N.E.2d 319 (Ohio 1947). Similarly, the Supreme Court of Delaware has held that neither a letter of transmittal enclosing a proxy form containing a vote against a merger nor the proxy itself can satisfy the written objection required by statute. *F.S. Moseley & Co. v. Midland-Ross Corp.*, 179 A.2d 295 (Del. 1962).

⁹⁴ 528 P.2d at 1277. The Waites had contended that the notice given was misleading in that it had stated that dissenting stockholders were required either to give a written notice of their dissent not later than 2 days after the shareholders' meeting or to commence an action to have the value of their shares fixed, whereas the statute requires both these steps to be taken to perfect the right to payment. The court treated this use of the word "or" instead of "and" in the notice as immaterial in view of the failure of the Waites to vote as required by statute and as specified in the notice. *Id.* at 1279.

⁹⁵ Neither the Model Act nor the Kentucky statute contains such a requirement. See MODEL ACT § 81; KRS § 271A.405.

⁹⁶ *Acree v. E.I.F.C., Inc.*, 502 S.W.2d 43 (Ky. 1973).

comply with the statutory procedures. This possibility has been diminished somewhat for corporations subject to the SEC proxy regulations, which require that the proxy statement inform stockholders of their appraisal rights and the procedure required to perfect these rights.⁹⁷ Furthermore, some state statutes today attempt to meet this problem by mandating that stockholders be notified of their statutory appraisal rights.⁹⁸ Notice requirements of this kind seem desirable, for the appraisal remedy cannot be a meaningful alternative to stockholders who dissent from fundamental corporate changes unless they are aware of the choices available to them.⁹⁹

C. *Ultra Vires Doctrine*

A recent federal case from the Southern District of Illinois, *Fidelity & Deposit Co. v. McClure Quarries, Inc.*,¹⁰⁰ exemplifies the care needed to understand the scope and application of modern corporation statutes directed at the ultra vires doctrine.¹⁰¹ *McClure* involved application of the ultra vires section of the Illinois Business Corporation Act.¹⁰² Since the Illinois provision was the source of a similar section in the Model Business Corporation Act,¹⁰³ it is therefore ultimately the source of the ultra vires section in the present Kentucky Business Corporation Act.¹⁰⁴ The essence of the provision is that the defense

⁹⁷ 17 C.F.R. § 240.14a-101 (1975).

⁹⁸ See, e.g., N.C. GEN. STAT. § 55-113(f)(1975); PA. STAT. ANN. tit. 15, § 805 (Supp. 1967)(merger and consolidation); PA. STAT. ANN. tit. 15, § 1311 (Supp. 1967)(sale of assets).

⁹⁹ The Kentucky Court of Appeals has made it clear that a corporation must be able to produce adequate proof that the notice of a meeting called to vote on a merger was mailed to the stockholders, and it must be careful to comply with the statutory requirement that the notice adequately state the purpose of the meeting. *Acree v. E.I.F.C., Inc.*, 502 S.W.2d 43 (Ky. 1973). In this case the notice referred to action by the stockholders to ratify a "plan of reorganization" but made no mention of a proposed merger. The court treated this as inadequate to convey notice of a merger and insufficient to absolve objecting stockholders from compliance with the statutory requirements relating to filing written objection before the meeting and demanding payment for their shares within 20 days after the meeting. *Id.* at 46-47.

¹⁰⁰ 376 F. Supp. 293 (S.D. Ill. 1974).

¹⁰¹ The term "ultra vires" is used to refer to transactions engaged in by a corporation which are foreign to its purposes or powers as stated in its articles of incorporation. See 7 W. FLETCHER, PRIVATE CORPORATIONS § 3399 (perm. ed. rev. repl. 1970).

¹⁰² ILL. REV. STAT. ANN. ch. 32, § 157.8 (Smith-Hurd 1954).

¹⁰³ MODEL ACT § 7.

¹⁰⁴ KRS § 271A.035.

of ultra vires is abolished in private transactions between a corporation and third parties but may be raised in a proceeding by: (1) a shareholder against the corporation to enjoin the transaction, or (2) the corporation against its officers or directors, or (3) the state to dissolve the corporation or to enjoin it from transacting unauthorized business.¹⁰⁵

There has been a tendency to confuse the ultra vires doctrine, which concerns corporate capacity or power, with the authority of corporate officers to act, which involves agency law, and to treat the latter as a facet of the ultra vires doctrine.¹⁰⁶ The court's opinion in *McClure* suggests how easy it is to overlook this distinction. The plaintiff surety company sued the defendant corporation, a company engaged in the business of quarrying, to recover on certain indemnity agreements which two of the corporation's executive officers, Lynch and Shanks, had executed on its behalf. The indemnity agreements were designed to protect the plaintiff from losses it might sustain from the issuance of performance bonds covering highway construction projects contracted by two other corporations in

¹⁰⁵ *Id.* The complete provision in the Kentucky statute reads:

No act of a corporation and no conveyance or transfer of real or personal property to or by a corporation shall be invalid by reason of the fact that the corporation was without capacity or power to do such act or to make or receive such conveyance or transfer, but such lack of capacity or power may be asserted:

(1) In a proceeding by a shareholder against the corporation to enjoin the doing of any act or the transfer of real or personal property by or to the corporation. If the unauthorized act or transfer sought to be enjoined is being, or is to be, performed or made pursuant to a contract to which the corporation is a party, the court may, if all of the parties to the contract are parties to the proceeding and if it deems the same to be equitable, set aside and enjoin the performance of such contract, and in so doing may allow to the corporation or to the other parties to the contract, as the case may be, compensation for the loss or damage sustained by either of them which may result from the action of the court in setting aside and enjoining the performance of such contract, but anticipated profits to be derived from the performance of the contract shall not be awarded by the court as a loss or damage sustained;

(2) In a proceeding by the corporation, whether acting directly or through a receiver, trustee, or other legal representative, or through shareholders in a representative suit, against the incumbent or former officers or directors of the corporation;

(3) In a proceeding by the attorney general to dissolve the corporation, or in a proceeding by the attorney general to enjoin the corporation from the transaction of unauthorized business.

¹⁰⁶ See 7 W. FLETCHER, PRIVATE CORPORATIONS 3401 (perm. ed. rev. repl. 1970).

which Lynch and Shanks were also executive officers. The defendant corporation interposed as defenses the corporation's lack of power to enter into the indemnity agreements and the officers' lack of authority to execute the agreements on behalf of the corporation. The court granted the plaintiff's motion to strike these defenses as insufficient under the Illinois statute abolishing the defense of *ultra vires*.¹⁰⁷

In reaching its decision, the court commented: "[A] person who deals with agents of a corporation, who have been vested with apparent authority to act for that corporation, should be protected against loss in the event that the agent does, in fact, exceed his apparent authority in his dealings with such persons."¹⁰⁸ To the extent that this was an attempt by the court to describe the concept of apparent authority as it relates to the power of agents to bind their principals in excess of their actual authority, it states an accepted principle of agency law and is relevant to the second defense raised by the corporation.¹⁰⁹ However, the insufficiency of this second defense would not be due to the statutory abolition of the defense of *ultra vires*; the defense would be insufficient because of the presence of evidence sufficient to establish the existence of apparent authority of the officers to act for the corporation. The statute dealing with the defense of *ultra vires* would be relevant only to the first defense, which was based on the corporation's lack of power to execute the indemnity agreements. Thus, although the court may have reached the correct result as to the validity of each defense, it would have been helpful if it had confined its reference to the *ultra vires* doctrine to the first defense based on the corporation's lack of capacity or power to act. This is a distinction which should be made in the interest of clear interpretation and application of the *ultra vires* doctrine. Although it may be evident in a given case that a corporation has the

¹⁰⁷ 376 F. Supp. at 295.

¹⁰⁸ *Id.* at 296.

¹⁰⁹ For a definition of apparent authority, see RESTATEMENT (SECOND) OF AGENCY § 8 (1957). That the second defense was understood to be related to the authority of the two corporate officers, Lynch and Shanks, to bind the corporation on the indemnity agreements is borne out by the corporation's answers to interrogatories, which stated "[t]hat no indemnity agreement which would obligate McClure could be executed without a resolution of its Board of Directors authorizing such an agreement." 376 F. Supp. at 296 n.3.

power under its articles of incorporation to act in certain respects, it may not be nearly as evident that a particular corporate officer is entitled to exercise that power on behalf of the corporation.¹¹⁰ It does not appear, therefore, that the statutory provision abolishing the defense of ultra vires should preclude the defense based on lack of officer authority, unless the language of the statute is broad enough to encompass the latter defense as well.¹¹¹

As a final comment, it may be observed that the section on ultra vires in the present Kentucky Business Corporation Act is new to Kentucky law, not having appeared in previous Kentucky corporation statutes.¹¹² The new provision should prove to be a valuable addition to Kentucky corporation law by helping to prevent the possible use of the ultra vires defense as a device to avoid liability on an otherwise legitimate agreement, properly executed on the corporation's behalf.¹¹³

¹¹⁰ For a case making this distinction under Texas law, see *In re Westec Corp.*, 434 F.2d 195 (5th Cir. 1970). Referring to the section on ultra vires in the Texas Business Corporation Act, the court remarked: "[This section], which ends the corporate defense of incapacity, refers to acts beyond the charter authority of the corporation rather than beyond the authority of particular officers of the corporation." *Id.* at 201.

¹¹¹ The California statute contains a provision broad enough to cover both defenses. CAL. CORP. CODE ANN. § 803(b)(1955) states:

No limitation upon the business, purposes, or powers of the corporation or upon the powers of the shareholders, officers, or directors, or the manner of exercise of such powers, contained in or implied by the articles . . . shall be asserted as between the corporation or any shareholder and any third person.

¹¹² The reference here is to previous general corporation statutes. A provision on ultra vires similar to that which now appears in the Kentucky Business Corporation Act has been a part of the Kentucky Nonprofit Corporation Act since its enactment in 1968. See KRS § 273.173.

¹¹³ For a comprehensive treatment of the ultra vires doctrine as affected by corporation statutes, see *Ham, Ultra Vires Contracts Under Modern Corporate Legislation*, 46 Ky. L.J. 215 (1958).